

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES DEAN WILKS, ) Case No. C06-871-JLR-JPD  
Plaintiff, )  
v. )  
JOHN LEIMBACH, et al., ) REPORT AND RECOMMENDATION  
Defendants. )

## I. INTRODUCTION AND SUMMARY CONCLUSION

16 Plaintiff James Dean Wilks, a former inmate at the King County Correctional Facility,  
17 proceeds *pro se* and *in forma pauperis* in this amended 42 U.S.C. § 1983 civil rights action  
18 against King County Corrections Officers John Leimbach and Leander Glenn. Dkt. No. 8; *see*  
19 *also* Dkt. No. 22 (dismissing certain defendants). Plaintiff's amended complaint makes  
20 excessive force arguments under the Eighth Amendment, unlawful search and seizure  
21 arguments under the Fourth Amendment, and also advances a retaliation claim under the First  
22 Amendment. *See* Dkt. No. 8. The present matter comes before the Court on defendant  
23 Leimbach's Motion for Partial Summary Judgment. Dkt. No. 26. Because plaintiff has failed  
24 to respond to this motion, it is treated as uncontested motion pursuant to Local Rule CR  
25 7(b)(2). After careful consideration of the motion, governing law, and the balance of the  
26 record, the Court recommends that defendant's the motion be GRANTED.

## II. DISCUSSION

A. Federal Rule of Civil Procedure 56

“Claims lacking merit may be dealt with through summary judgment” under Rule 56 of the Federal Rules of Civil Procedure. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Summary judgment “shall be entered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

Here, the defendants filed a detailed motion outlining the arguments of non-exhaustion of state law post-deprivation remedies sufficient to defeat plaintiff's Fourth Amendment attack against defendant Leimbach, as well as the absence of a causal connection and the presence of a legitimate correctional purpose sufficient to defeat plaintiff's First Amendment claim against defendant Leimbach. *See Hudson v. Palmer*, 468 U.S. 517, 533-36 (1984) (requiring exhaustion of state post-deprivation remedies before pursuing § 1983 suit); *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005) (outlining necessary elements of a viable First Amendment retaliation claim). The defendants' brief was supported by the declarations of John Leimbach (Dkt. No. 28), Roberta Johnson (Dkt. No. 29), and David Eldred (Dkt. No. 27). The defendants do not seek summary judgment with regard to plaintiff's excessive force claims, but rather, limit their motion to plaintiff's claim that defendant Leimbach violated plaintiff's First and Fourteenth Amendment rights by removing plaintiff's aviation calendar from his cell on or about June 6, 2006. Dkt. No. 26 at 2.

The defendants' summary judgment papers satisfy the burden of Rule 56(c) by establishing that the nonmovant lacks the essential elements needed to support his case, much less satisfy his burden of persuasion at trial. This failure of proof "renders all other facts immaterial," creating no genuine issue of fact and thereby entitling the defendants to summary judgment on the issues raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

1 Furthermore, plaintiff has failed to respond to the defendants' motion for partial summary  
2 judgment. Under Local Rule CR 7(b)(2) “[i]f a party fails to file papers in opposition to a  
3 motion, such failure may be considered by the court as an admission that the motion has  
4 merit.” By neglecting to respond to the arguments made in defendants' motion, plaintiff has  
5 failed to meet his burden of moving beyond the pleadings to, in the words of the rule, “set forth  
6 specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). As a  
7 result, defendants' motion for partial summary judgment should be granted with respect to the  
8 specific issues identified by the defendants' motion.

**B. Pretrial Scheduling Order Is Stricken**

10 Because defendants' partial motion for summary judgment should be granted, it is  
11 appropriate that the pretrial scheduling order in this case (Dkt. No. 25) be stricken, and the  
12 parties shall instead provide the Court with a joint pretrial statement or a status report **no later**  
13 **than December 21, 2007.**

## II. CONCLUSION

15 For the foregoing reasons, the Court recommends that defendants' Motion for Partial  
16 Summary Judgment (Dkt. No. 26) be GRANTED. Consequently, the pretrial scheduling order  
17 in this case (Dkt. No. 25) is STRICKEN, and the parties shall provide the Court with a joint  
18 pretrial statement or a status report no later than December 21, 2007. A proposed order  
19 accompanies this Report and Recommendation.

20 DATED this 28th day of November, 2007.

  
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JAMES P. DONOHUE  
United States Magistrate Judge